THE HON'BLE SRI JUSTICE P.S.NARAYANA

W.P.No.17358 of 2007

Date: 5th October, 2007

Between :-

M/s.M. Sami Industries,
At Plot No.60, IDA, Nellimerla
Vizianagaram District
Rep.by its Proprietor Mohammed Amanullah .. Petitioner

And

The Union of India,
Rep.by its Secretary to Govt.,
Department of Consumer Affairs,
Food and Public Distribution,
Ministry of Consumer Affairs, New Delhi
And 3 others .. Respondents

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ORDER:-

Heard the Counsel.

2. The counter affidavit is filed by the 4th respondent.

3. The Writ Petition is filed for a Writ of Mandamus directing the respondents not to cancel the license issued in favour of the petitioner without giving an opportunity to

rectify the deviation if any and permit to carry on with the business, and to declare the Stop Marking Proceedings No.VBO/94/L-6508167, dt.18-7-2007 issued by the 4th respondent, the Bureau of Indian Standards, Visakhapatnam Branch Office, visakhapatnam as illegal, arbitrary, and in violation of principles of natural justice and pass such other suitable orders.

4. It is stated that in the Writ Petition that the petitioner is a resident of Vizianagaram District and completed his post graduation, for long time he remained unemployed. It is also stated that in the year 2004 the petitioner had decided to start his own business by obtaining loan from the Bank and as such he had approached State Bank of India with his proposal to run a Packaged Drinking Water Unit at Nellimarla, Vizianagaram District. It is further stated that the State Bank of India having fully satisfied with the petitioner's proposal had approved loan amount of Rs.20,50,000/- to set up the industry and the remaining balance of Rs.5,00,000/- needed as additional money, the petitioner procured from his family members and friends, and that therefore an amount of Rs.25,50,000/- was invested to get the plant functioning. It is also stated by the petitioner that the Packaged Drinking Water Plant is running under the name and style of M/s.M.Sami Industries, a proprietary concern with him as its sole Proprietor and the said Industry is registered by District Industries Centre as Small Scale Industry. It is also further stated by the petitioner that he had applied for grant of BIS Certificate to the Bureau of Indian Standards and also for

PFA Licence (i.e., Food License) and that after the commencement of functioning of the Industry, the concerned authorities from both the Departments after thorough inspection of his unit and having assured themselves of the Standards maintained at his unit, had issued BIS Certificate under the license No.CM/L-6508167, dt.17-5-2005, and P.F.A.License No.M-59/F1/VZM/D-II/2007-08, dt.23-5-2005. It is further stated that right from the inception of the Unit, the petitioner adhering to all the norms and guidelines specified by the BIS and PFA without there being any deviation whatsoever those are within his knowledge and as circulated and intimated by the BIS to the petitioner from time to time. It is also stated by the petitioner that he is getting his BIS certification renewed from time to time without fail and there is never being any complaint against his unit from any quarter as to supply of substandard product or as non-adherence to the norms of BIS in the last three years since it is only after thorough inspection BIS certification is being renewed year after year and the latest BIS Certificate of the Unit is valid up to 15-5-2008. It is also further averred by the petitioner that while the matter stood thus, on 7-6-2007 authorities of BIS had visited his unit without prior information, minutes before closing of the lab and office at 1700 hours and haphazardly reached to the conclusion that Microbiologist and Chemist were not present in the plant, labs are locked and few other allegations, without giving opportunity to explain and slapped the deviation report dt.7-6-2007 on

his Unit. It is also stated that as a matter of fact, the very objections of BIS, he had categorically explained that Microbiologist and Chemist are very much employed and that the Chemisthad finished his work of testing and left the plant, by that time by making entries in the record book, whereas the microbiologist had also completed his test and made entries in the record and went to secure electrician to rectify the electric miniature circuit breakers as they are tripped. It is also stated that not taking into account these aspects, the BIS authorities had wrongly concluded that the Microbiologist and Chemist are not present in the Unit, which in fact is not true and without basis and there is no requirement that Microbiologist and Chemist should be present through the working hours of the Unit. It is further stated that the BIS authorities had also taken note of the entries made in the record book of the lab and found them to be up to date, in which they had also found tests carried out were well within the norms specified by the BIS and had signed on the record book thereafter. It is further stated that as per the guidelines given by BIS, the STI (Scheme of Testing and Inspection) the tests have to be carried out at the following intervals as per Form-I, the report is for every four hours, Form-II for each control unit/for daily, and Form-III Report for weekly and monthly testings, these to be carried within the lab. It is further stated that as per the guidelines for every four hours, the production of product has to be taken up and thereafter 4 hours another set of tests are carried out, so absence of Microbiologist is quiet absurd and illogical. It

is also stated that the BIS authorities had quiet erroneously and illegally issued Stop Marking Notice dt.13-7-2007 and received by the petitioner on 17-7-2007 in which it is stated that a detailed notice would be given to him and also a letter dt.18-7-2007 was dispatched to the petitioner and he received the same on 4-8-2007, in which it is stated that his license for the Unit is under process of cancellation. It is further stated that the cancellation process contemplated by the BIS is arbitrary and illegal since even after the petitioner's clear explanation as to their findings, they are reluctant to hear and explain to him the reasons for such drastic measures of cancellation without there being basis attributing violation on his part. It is further stated that the glaring irregularities in the deviation report and subsequent notice thereof can be manifested by the finding given thereunder in Point No.7 therein it is stated that, "additional 2nd BOD incubator, fumehood and inspection screen was not installed". It is also stated that as a matter of fact, the BIS itself has sent a circulation through a letter dt.13-6-2007 calling upon the Packaged Drinking Water Units to procure additional 2nd BOD incubator, fumehood and inspection screen, in compliance thereto, the petitioner had purchased the said equipment and intimated to the BIS through a letter dt.16-7-2007 duly enclosing purchase invoices of the equipment and this fact is blatant manifestation that how shoddily the deviation report has been prepared with an unjust intent to cancel the license of his unit at all costs without there being any valid rhyme

or reason. It is further stated that the very inspection has been conducted on 7-6-2007, in which one of the reasons given for proposed cancellation of the petitioner unit's license was due to non-presence of additional 2nd BOD incubator, fumehood and inspection screen, whereas the very BIS itself has given the circulation for its presence on 13-6-2007 i.e., 6 days after the raid conducted by Officers of BIS on his unit. It is also further stated that the very incorporation of the above findings as to non-presence of additional 2nd BOD incubator, fumehood and inspection screen in the deviation report dt.7-6-2007 and subsequent letter dt.18-7-2007 would goes to show that the officer of BIS was hell-bent on victimizing the petitioner by closing his unit on some pretext or other. Further it is stated that the BIS with a sole visit and inspection of the petitioner's unit at the closing hours having spent hardly 10 to 15 minutes at the Unit, had quiet hastily made the inspection and prepared the deviation report without considering his explanations and if at all there were any deviations in the petitioner's unit, the same can be rectified rather than closure of the Unit with one such sole inspection concluded in matter of 10 to 15 minutes is irrational and arbitrary. It is also stated by the petitioner that absolutely no opportunity was given to the petitioner to put forth his version before the BIS as to cancellation of license of his unit, violating his basic principles of natural justice, nor reasonable time is given to rectify the deviations if any. It is further stated that the petitioner had made huge investment of Rs.25,50,000/- by taking loan from the State

Bank of India and through personal borrowings, there remained huge balance to be repaid to the bank, if at all his license is cancelled basing upon such a haphazardly prepared report by BIS, the petitioner would be put to huge financial loss and injury. It is also further stated by the petitioner that his business has come to virtual halt as a result of Stop Marking Notice dt.13-7-2007 putting the petitioner to heavy financial loss affecting his fundamental right under Article 19(1)(g) of the Constitution of India and therefore, it is pertinent to allow the petitioner to carry on the business with immediate effect by giving an opportunity to rectify and clarify the doubts if any in the deviation report.

5. In the counter affidavit filed by the 4th respondent it is stated that it is true that the petitioner has made an application for grant of BIS certificate and the same was granted and the licence is effective from 17-5-2005 and being renewed, the present BIS licence is valid up to 15-5-2008 and also it is pertinent to mention here that the licence was granted for the product packaged drinking water with the packing material scope as 20 Ltrs Pet containers only whereas the petitioner started misusing BIS Licence for PE flexible pouches packing variety. It is also stated that on 28-6-2006 BIS has drawn product sample for independent testing and the same failed to meet the standards prescribed and the petitioner was informed of the same and the petitioner has taken corrective action. It is also stated that usually the staff of BIS conducts surprise visits without any intimation with the

purpose of monitoring the performance of the operation of licence. It is further stated that a surprise of the petitioner's unit was made on 7-6-2007 within the working hours of the petitioner Unit and during the visit, number of deviations were observed and the same were intimated to the proprietor in writing under acknowledgment and the petitioner has endorsed that he has agreed all the deviations. It is also stated that surprisingly in the explanation submitted on 13-6-2007 the petitioner has given reasons which were found to be not satisfactory and the replies submitted in his explanation observed to be afterthoughts and also further stated that having accepted all the discrepancies observed at the time of visit, the petitioner has submitted the explanation with false information. It is also further averred that as the explanation submitted by the petitioner is not satisfactory, after giving sufficient time Stop Marking instructions were issued on 18-7-2007 and the action of this respondent is perfectly legal and void. It is also further stated that the averments made in para 5 with regard to installation of 2nd BOD incubator is one of the observation and not only requirement and leaving out the other major observations pointed out the petitioner has complied with the observation by installing 2nd BOD incubator. The other observations are not fully complied with. They are:-

a) Marking on packing varieties not in the scope of licence thus has committed large scale misuse for which petitioner's request dated 28-10-2005 is still pending for want of sufficient documents and equipping fully for testing.

b) Partially following the scheme of testing and inspection in operation of BIS licence for the product and packing materials.

c) The testing facilities available with the petitioner unit are incomplete even for unapproved variety. However, ISI marking used without full testing for the conformity to ISI standards.

d) Not maintaining test records as per BIS requirement

e) Dispatching the product with ISI mark on un-approved variety of pacing material without following concerned standard and testing. Even testing facilities available are incomplete. Test results entered in advance with false entries.

It is also stated that the allegation that the inspection was conducted in a hastily manner is not correct. The petitioner was given sufficient time to comply with the observations made during the inspection. It is also stated that as the explanation submitted by the petitioner is not satisfactory, a Stop Marking instructions were issued with valid reason and justification.

6. A reply affidavit is filed narrating several facts. It is stated by the petitioner that insofar as the allegations made in para 3 of the counter affidavit that the misusing BIS licence for P.E. flexible pouches packing variety is concerned, the petitioner submits that in a batch of Writ Petitions this Hon'ble Court in W.P.Nos.16110/2004 and 20018/2004 granted direction in favour of the petitioners therein not to restrict the container of packaged drinking water in excess of 5 litres to be colourless etc., and the said order has been by the Division Bench of this Hon'ble Court. It is also stated that the petitioner also filed a Writ

Petition in W.P.No.11711/2005 and the Division Bench of this Hon'ble Court granted the similar order in his favour on 8-8-2005 and also further stated that on 6-3-2006 the said Writ Petition was dismissed for default by Division Bench of this Hon'ble Court and the petitioner filed an application to restore the said Writ Petition and the same is pending. It is further stated that the batch of Writ Petitions wherein the order referred to above has been passed are pending before the Division Bench of this Hon'ble Court. It is also stated by the petitioner that apart from that, his application for permission to use Polythene Flexible Pouches as per I.S.; 15609; 2005 with the required information by the authorities of the respondent submitted on 28-10-2005, as admitted by the respondent has not been rejected and in fact, as admitted by the respondent the product sample drawn on 28-6-2006 was a flexible pouch from the vendor and the deficiency on independent testing to meet the standards prescribed has been rectified by the petitioner and the same is admitted and that therefore, the respondents in the light of the order of the Division Bench of this Hon'ble Court never objected to the production of the packaged drinking water in flexible pouches as the same answered the entire required tests stipulated by the respondents. It is also stated that the deficiencies pointed out in para 5 of the counter affidavit mostly relates to marking on flexible pouches and not following the scheme of testing and not maintaining the test records and dispatching the product with ISI marking on unapproved variety of packing material. It is further

stated that in the light of the above said fact, the petitioner had not deviated from the conditions in relation to marking and after 7-6-2007 when the inspection was conducted, the petitioner had rectified all the deficiencies and the same is reflected in his explanation dt.13-6-2007. It is further stated that the allegations in para 4 of the counter affidavit that, the petitioner had agreed all the deficiencies pointed out on 7-6-2007 is not correct and on the other hand, the petitioner stated “Agreed. Reply within 7 days” and also stated that from this it cannot be said that the petitioner had agreed to take action with reference to column No.2 of the report dt.7-6-2007 and accordingly, with all true fact, the petitioner submitted his explanation dt.13-6-2007, but, unfortunately, the authorities of the respondents did not consider his explanation nor did they make further visit of his factory to satisfy themselves about his reply and issue the impugned Stop Marking Order dt.18-7-2007 arbitrarily. It is also further stated that under the regulations 1988 known as “The Bureau of Indian Standards (Certification)Regulations, 1988” under Regulation 7-B Stop Marking of the product can be given if the product carrying the standard mark may not be conforming to the Indian Standard on sufficient evidence. It is also stated by the petitioner that but unfortunately, though in his explanation, he stated that the deficiencies pointed out by the inspecting authorities are not tenable and necessary steps were taken to rectify the other deficiencies pointed out, no further action to verify his explanation was taken and the Stop Marking order has

been capriciously issued. It is further stated that even otherwise, the very same regulation provides for presumption of ISI marking on satisfaction that the licensee has taken by actions and sufficient evidence is available about the conformity of the product to the relevant standard. Thus, it is stated that the order impugned is highly unjust and in violation of Regulation 7 of the Regulations 1988.

7. In the light of the respective stands taken by the parties in the affidavit filed in support of the Writ Petition, in the counter affidavit and also in the reply affidavit as well, this Court is inclined to dispose of the Writ Petition with the following directions:-

> *"3rd and 4th respondents to inspect the petitioner unit to satisfy whether the defects pointed out had been rectified as pleaded by the petitioner, within a period of two weeks from the date of receipt of this order. It is also brought to the notice of this Court that the Division Bench of this Court made an interim order in W.P.Nos.16110/2004 and 20018/2004 in relation to flexible pouches. R.3 and R.4 are at liberty to consider the case in the light of those interim orders also apart from the stand taken by the writ petitioner that the defects had been already rectified after due inspection."*

8. The Writ Petition is disposed of accordingly. No order as to costs.

Justice P.S.Narayana

5th October, 2007

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